

## **Practitioner's Guide to Changing the Bargaining Unit**

The Indiana Education Employment Relations Board is a neutral agency that oversees relations between public school teachers and the schools they serve.

IEERB staff has compiled the following packet on changing the bargaining unit for **guidance only**. **IEERB is a neutral agency and cannot provide legal advice; nor does this guidance bind IEERB in any way.** This guidance is not intended to take the place of careful review of IC 20-29-5 and 560 IAC 2-2, or as a substitute for legal advice. The relevant statute and rules are provided on IEERB's website as [www.in.gov/ieerb](http://www.in.gov/ieerb). Please contact IEERB should you have further questions.

**IMPORTANT NOTE:** On June 13, 2016, the IEERB Board issued an order finding that the bargaining units provided for in the current collective bargaining agreement will be considered the bargaining unit for the respective parties unless otherwise challenged. All future changes to the bargaining unit must be made through IEERB to be effective.

### **A. Overview**

A bargaining unit is a group of school employees that the employer has recognized or IEERB has certified as appropriate to be represented by a school employee organization (e.g., union) for the purpose of collective bargaining. Not all employees of the school are considered school employees for purposes of bargaining. Only full-time, certificated employees can be in the bargaining unit. A certificated employee is an individual whose contract with the school corporation requires that the person hold a license or permit from the Indiana Department of Education, Division of Professional Standards under IC 20-28. I.C. § 20-29-2-4. Additionally, supervisors,<sup>i</sup> confidential employees,<sup>ii</sup> and employees performing security work<sup>iii</sup> may not be in the bargaining unit. *See* I.C. § 20-29-2-13.

**All changes to the bargaining unit must go through IEERB.** Therefore, it is imperative that all interested parties are aware of the bargaining unit. The bargaining unit description must be part of the collective bargaining agreement, which must be posted on the school employer's website. It may also may be found on IEERB's website (through Gateway or IEERB Search).

A bargaining unit can be changed at any time. 560 IAC 2-2-1(c). However, the changes may not be effective immediately, depending on the time of the change. A unit can be changed in the following two ways: (1) through mutual agreement of the school employer and exclusive representative, or (2) through a unit change petition (details on the two processes below). Practitioner's Tip: These are the only two ways to change a bargaining unit. Bargaining a position in or out of the unit is NOT a compliant way to change a bargaining unit.

There are two types of changes to the bargaining unit: (1) unit amendment and (2) unit clarification. **Unit amendment** is a change in the bargaining unit that involves adding or excluding a **newly created** position. **Unit clarification** is a change in the bargaining unit that

involves adding or excluding an **existing** position. Although there are different terms for changing the unit, a party's failure to use the appropriate term will not affect the outcome of a mutual request or petition to change the unit.

## **B. Mutual Request**

**Mutual request involves the following steps:**

- (1) parties agree on an allowable change to unit;**
- (2) parties post notice of the proposed change (or mail to unit members if school not in session);**
- (3) 30 day notice period<sup>1</sup>;**
- (4) parties send notice and date of notice posting/mailing to IEERB; and**
- (5) if all steps met and no complaints filed, IEERB certifies change.**

If the school employer and exclusive representative agree to change the unit, "the school employer and exclusive representative shall post notice of the amendment or clarification in each school building for no less than thirty (30) days." The notice must include:

- (1) Description of the existing bargaining unit;
- (2) Proposed amendment or clarification;
- (3) Current address and telephone number of the board; and
- (4) Statement that objections to the amendment or clarification by any affected school employee may be made to IEERB within 30 days of the first date of posting or of the mailing of the notice.

A sample notice is attached. If the amendment or clarification is made in a period when school employees are not in attendance, the school employer must mail the notice to each school employee to her last known place of residence. The thirty-day notice period will start three days from the mailing of the notice.

A school employee affected by the proposed change may object to the change by filing a complaint. If there is an objection, the Board shall determine the unit as described below in section Petition/Complaint. If IEERB receives a challenge to the proposed change during this time, it will send notice to the school employer and the exclusive representative.

Once the notice period has elapsed, the parties must submit to IEERB a formal request of the bargaining unit change, including:

- (1) the date notice was posted or mailed;
- (2) a copy of the notice that was posted or mailed; and
- (3) a statement that the change was ratified after the notice period.

A sample request is attached. An example of a position that the parties have agreed is included in the bargaining unit: Assistant Athletic Supervisor.<sup>iv</sup> An example of a position that the parties have agreed is excluded from the bargaining unit: Department Supervisor.<sup>v</sup> Note: examples provided are examples only; the parties should undertake an individualized analysis of the position in question before making any determinations on whether the position should be in the bargaining unit.

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<sup>1</sup> If notice is posted, the notice period is 30 days from date of posting. If the notice is mailed, the notice period is 33 days from the date it was mailed (3 days for receipt of notice plus 30 days for notice).

### **C. Petition/Complaint**

**IEERB will determine the appropriate bargaining unit if a school employee files a complaint, or a school employee organization or school employer file a petition.**

A petition or complaint must include:

- (1) Contact information for the superintendent and school employer representative;
- (2) Contact information for the petitioner, school employee organization, and petitioner's representative;
- (3) A description of the present bargaining unit and date of certification or recognition;
- (4) Proposed clarification or amendment of the unit and the reasons why proposed clarification or amendment is requested;
- (5) Any other relevant facts; and
- (6) Signature of petitioner or petitioner's duly authorized agent.

560 IAC 2-2-3(d). A petition form is available at [www.in.gov/ieerb](http://www.in.gov/ieerb).

Petitions will be heard for current or newly created positions. Petitions will not be heard for hypothetical positions.<sup>vi</sup> The decision on whether a position is included in, or excluded from, the unit must be based on, but is not limited to, the following considerations: efficient administration of school operations; the existence of a community of interest among school employees; the effects on the school corporation and school employees of fragmentation of units; and recommendations of the parties involved. Example of a position that IEERB has found to be properly included in the bargaining unit: Coordinator of Instructional Support.<sup>vii</sup> Example of a position that IEERB has found to be properly excluded from the bargaining unit: Director of Technology.<sup>viii</sup> Note: examples provided are examples only; the parties should undertake a fact-sensitive analysis of the position in question before making any determinations on whether the position should be in the bargaining unit.

The board or its agent may make a determination based upon briefs and papers filed unless a hearing is requested.

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<sup>i</sup> A supervisor is an individual who has: 1) authority, acting for the school corporation, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline school employees; 2) responsibility to direct school employees and adjust their grievances; or 3) responsibility to effectively recommend the actions described in subdivisions 1) through 2), that is not of a merely routine or clerical nature but requires the use of independent judgment. The term includes superintendents, assistant superintendents, business managers and supervisors, directors with school corporation-wide responsibilities, principals and vice principals, and department heads who have responsibility for evaluating teachers. I.C. § 20-29-2-19.

<sup>ii</sup> A confidential employee is a school employee whose: (1) unrestricted access to confidential personnel files; or (2) functional responsibilities or knowledge in connection with the issues involved in dealings between the school corporation and its employees, makes the school employee's membership in a school employee organization incompatible with the school employee's official duties. I.C. § 20-29-2-5.

<sup>iii</sup> An employee performing security work is a school employee: (1) whose primary responsibility is the protection of personal and real property owned or leased by the school corporation; or (2) who performs police or quasi-police powers. I.C. § 20-29-2-8.

<sup>iv</sup> *Northeastern Wayne*, R-00-05-8375, 2000 WL 35738218 (H.E. Rep. Oct. 23, 2000).

<sup>v</sup> *Mount Vernon*, R-74-100-6590, 1974 WL 336145 (H.E. Rep. Aug. 19, 1974).

<sup>vi</sup> The question is not whether the position has been filled, but whether "someone is likely to be employed in a reasonable short period of time." *Tipton*, R-93-05-7945, 1993 WL 13653501 (H.E. Rep. June 28, 1993). When a position has not yet been filled, a determination will be made "based on the best evidence available concerning future job responsibilities. On the other hand, a procedure must be available to provide for the possibility that actual practice does not accord with prospective assessment." *Id.* (quoting *Tippecanoe*, R-90-07-7865, 1990 WL 10556511 (H.E. Rep. Sep. 27, 1990)). Therefore, any interested party may reopen the question of the bargaining unit based on actual job performance; some hearing officers will set a certain window within the next year. *See id.*

<sup>vii</sup> The position was found to be part of the bargaining unit based on the following findings on the position: (1) primary responsibility would not be the protection of property; (2) no unrestricted access to confidential personnel files; (3) no functional responsibilities or knowledge concerning dealing between the school employer and its employees; and (4) position would not require evaluation of school employees or recommendation concerning the employment of school employees. *Tipton*, R-93-05-7945, 1993 WL 13653501 (H.E. Rep. June 28, 1993).

<sup>viii</sup> The Director of Technology was excluded from the bargaining unit because the job was found to fall under the definition of supervisor and confidential employee based on the following findings regarding the position: (1) direct and monitor school employees in the development and implementation of technology throughout the school corporation; (2) primary responsibility to evaluate school employees who are media specialists and librarians. The Director also would contribute to the evaluations of other school employees with respect to their use or lack of use of technology; (3) influential recommendation to the Superintendent concerning the hiring, assignment, transfer, discipline, and discharge of school employees, to the extent that such recommendations relate to the use or lack of use of technology; (4) unrestricted access to the confidential personnel files of bargaining unit members; and (5) participate with supervisory personnel in staff meetings in which bargaining issues will be discussed. *Tipton*, R-93-05-7945, 1993 WL 13653501 (H.E. Rep. June 28, 1993); *see also Marion*, R-92-07-2865 (H.E. Rep. Mar. 5, 1993) (excluding computer technology coordinator as supervisor); *Tippecanoe* (excluding Coordinator of Gifted and Enrichment Education; Coordinator of Instructional Services).